

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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HY CITE CORPORATION,

Plaintiff,

v.

Case No. 10-CV-168

REGAL WARE, INC. and  
SALADMASTER, INC.,

Defendants.

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**SENTRY INSURANCE A MUTUAL COMPANY'S  
MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION TO INTERVENE**

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Sentry Insurance a Mutual Company ("Sentry") by its attorneys, von Briesen & Roper, s.c., submits this brief in support of its motion to intervene as follows:

**FACTS**

On March 29, 2010, Plaintiff, Hy Cite Corporation ("Hy Cite"), filed this lawsuit against Defendants Regal Ware, Inc. ("Regal Ware") and SaladMaster, Inc. ("SaladMaster") ("Underlying Complaint"). The Underlying Complaint includes the following allegations: (1) False patent marking under the Patent Laws of the United States, 35 U.S.C. § 292; (2) Declaratory Relief for No Tortious Interference with Contract; (3) Defamation; (4) Product Disparagement; (5) Unfair Competition Under the Federal Lanham Act, as amended, 15 U.S.C. § 1125(a); and (6) Common Law Unfair Competition.

On June 25, 2010, the Court entered an Order Granting Motion to Intervene by United States of America. Trial is scheduled to commence on June 13, 2011.

Regal Ware tendered the defense of this matter to Sentry pursuant to a Commercial General Liability Policy (Policy No. 90-02939-02) issued by Sentry to Regal Ware for the policy period 1/1/2010 to 1/1/2011 (the "Policy"). Sentry accepted the tender of defense subject to a complete

reservation of rights. Sentry seeks to intervene on the ground that there is an issue whether the claims against Regal Ware are covered under the Policy.

### **ARGUMENT**

Federal Rule of Civil Procedure 24(a) provides that a party has a right to intervene in an action when:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In order to intervene,

an applicant must demonstrate that (1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest.

*Thorson*, 219 F.R.D. at 626.

Hy Cite filed the Underlying Complaint on March 29, 2010. The United States of America intervened in this action approximately two months ago, on June 25, 2010. Trial is not scheduled to commence for nine and one-half months, on June 13, 2011. No claims or liabilities have been finally determined, and no factual disputes or legal issues have been conclusively resolved. Therefore, this motion is timely.

Sentry is being asked to pay to defend the action. To the extent Regal Ware is held liable to compensate Hy Cite, Regal Ware, by virtue of its tender, is seeking to have Sentry bear that obligation. Therefore, Sentry has an interest in the transaction which is the subject of this action.

Regal Ware is seeking coverage under the Policy for the claims alleged in this action. Sentry clearly has a practical interest and stake in the resolution of the allegations against Regal Ware. Sentry

may be unable to protect its interest if the claims against Regal Ware are disposed of without Sentry's involvement.

Finally, no other party will raise or pursue Sentry's coverage defenses and, therefore, Sentry's interests would not be represented by any other party.

**CONCLUSION**

For the reasons stated above, and those offered in the Affidavit of Heidi L. Vogt, Sentry respectfully requests the Court to grant intervention to Sentry.

Dated this 30<sup>th</sup> day of August, 2010.

By: s/ Heidi L. Vogt  
Heidi L. Vogt, SBN 1001318  
Jason R. Fathallah, SBN 1060040  
*Attorneys for Sentry Insurance a Mutual Company*  
von BRIESEN & ROPER, s.c.  
411 East Wisconsin Avenue, Suite 700  
Milwaukee, WI 53202  
Phone: (414) 287-1258  
Fax: (414) 276-6281  
E-mail: [hvogt@vonbriesen.com](mailto:hvogt@vonbriesen.com) and  
[jfathallah@vonbriesen.com](mailto:jfathallah@vonbriesen.com)